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STATEMENTS

STATE OF MONTANA

STATE TAX APPEAL BOARD

REPORT ON EXAMINATION OF FINANCIAL STATEMENTS

Fiscal Year Ended June 30, 1976



OFFICE OF THE LEGISLATIVE AUDITOR
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STATE OF MONTANA
STATE TAX APPEAL BOARD
REPORT ON EXAMINATION OF FINANCIAL STATEMENTS
Fiscal Year Ended June 30, 1976

OVERVIEW
AUDIT OF
STATE TAX APPEAL BOARD

December 1976

INTRODUCTION

The audit of the State Tax Appeal Board was a financial-compliance audit. The purposes of the audit were to determine whether the financial operations of the board were properly conducted, whether the financial statements for fiscal year 1975-76 were presented fairly and whether the board complied with applicable laws and regulations.

The audit resulted in an unqualified opinion on the financial statements. An unqualified opinion means that the financial statements present fairly the board's financial position, operations and change in fund balance in conformity with generally accepted accounting principles.

There are twelve recommendations in the audit report. The chairman of the board concurred with ten of the recommendations. The board members concurred with all recommendations. The chairman submitted a reply to the recommendations separate from the board members because of differing opinions on the recommendations. The full texts of these written responses to the audit report are included in the report beginning on page 25.

SYNOPSIS OF MAJOR FINDINGS

The following are the areas of major findings in the report.

Board Duties

The State Tax Appeal Board by law is a full time board; however, the need for a full-time board does not appear to be justified by the board's workload. The board's work is concentrated into a four month period. The board has little to do outside of this period. The board

currently has three persons employed in support positions. This staff size does not appear justified based on the board's workload.

We believe that a part-time board might serve the needs of the taxpayers at a much lower cost, however, there are various problems which must be resolved before this transition would be possible. If a part-time board is not feasible, the full-time board should assume many of the duties now performed by the support staff. The legislature could also consider assigning more duties to the board.

We made no specific recommendations in this area because it requires a more comprehensive review beyond the scope of this audit. We believe the need for a full-time board with the present support staff should be the subject of further legislative review.

Working Hours

Board members often do not appear at work for an eight-hour day, and on many days they do not appear at all. Absences are not charged to vacation, sick leave, or compensatory time off. The board has not complied with working hour or leave statutes because they believe they are officers of the state.

We requested an Attorney General's opinion on this matter and that opinion is included on page 20 of this report. The opinion states that board members may generally be considered public officers, but for the specific purpose of determining the applicability of state vacation, sick leave, and working hour statutes, they must be considered state employees who are subject to the provisions of these particular statutes. The board's chairman does not agree with this opinion and has rejected our recommendation that the board comply with these statutes. The other board members concurred with our recommendations in this area.

In disagreeing with this section concerning working hours the chairman is relying on an opinion of the board's retained attorney which directly contradicts a latter opinion issued by the Attorney General. In 35 Opinions of the Attorney General, No. 68, it was held that opinions by legal counsel for state agencies which conflict with the Attorney General's opinion should be disregarded. The Attorney General's opinion is included in the report beginning on page 41. The chairman's reply and the retained attorney's opinion are included in this report beginning on page 25.

Board Administration

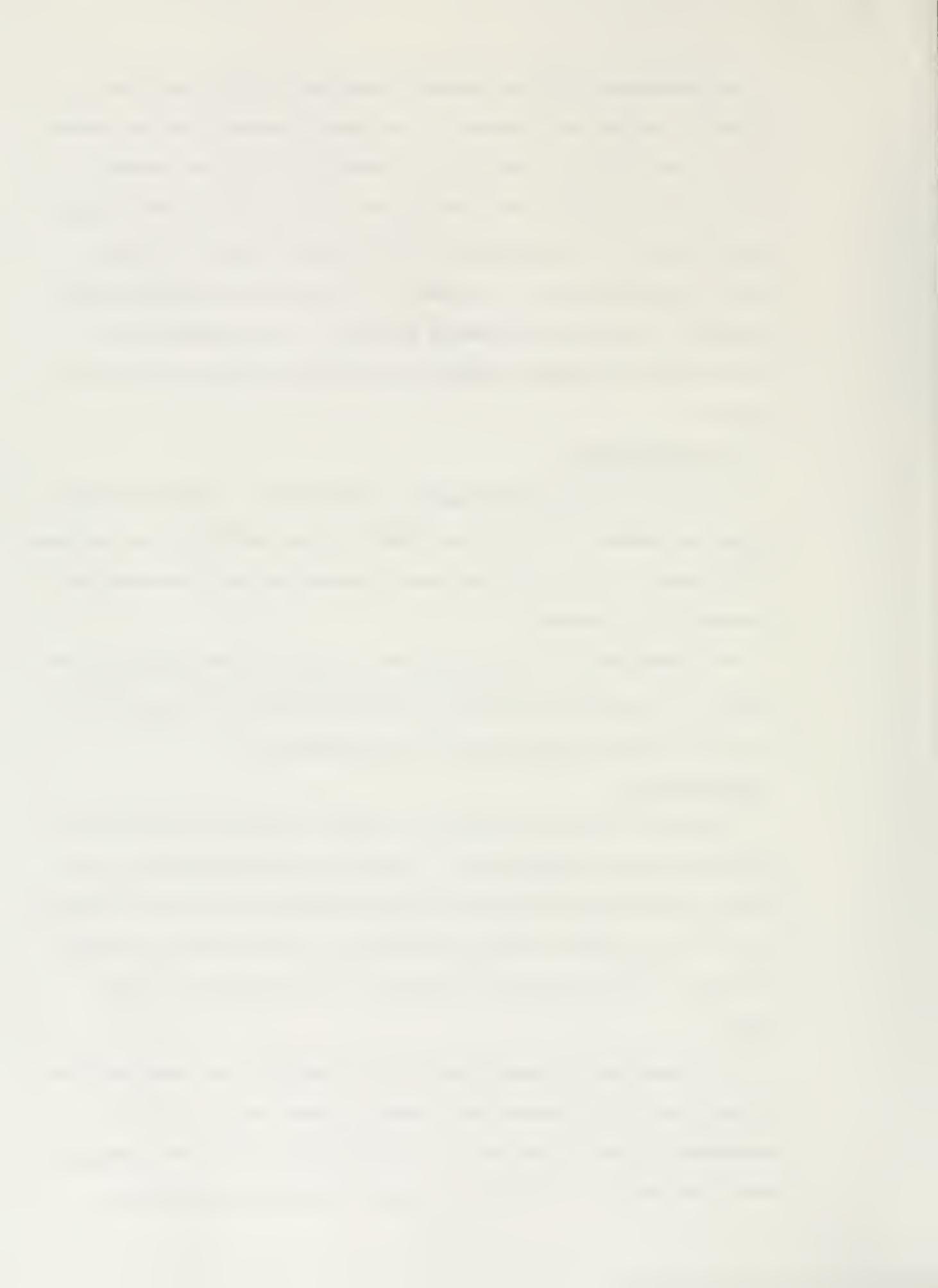
The State Tax Appeal Board uses a majority vote to decide all board rulings and orders. The board also makes internal administrative decisions in this manner. This policy has caused unneeded delays in the handling of administrative matters.

We recommended the board assign the chairman the responsibility and authority for handling the day-to-day administration of the agency. The board and chairman concurred with this recommendation.

Employee Leave

The State Tax Appeal Board has not been in compliance with statutes concerning employee compensation. They have allowed employees to accumulate compensatory time balances when the employees should have received pay at one and one-half their normal wage rate. The board has also made adjustments to time records with little or no documentation for the changes.

We recommended the board comply with compensation statutes and that the board adequately document any changes to time records. We also recommended procedures that would strengthen their control over employee leave. The chairman and the board agreed to these recommendations.



Attorney Services

The board retains the services of an attorney. The board does not have a written contract with the attorney stating services and duties to be performed under the retainer. We recommended that the board obtain a contract with the attorney stating his duties and the basis for attorney billings. Both the chairman and board agreed to this recommendation.

We also recommended that the board document the time and nature of services provided by the attorney and determine if attorney cost could be lowered by implementing hourly rates. The board members concurred with this recommendation. The chairman did not concur because he felt the board is receiving full value from the retained attorney and keeping records documenting the services of the attorney would be an unnecessary time consuming task.

Other Recommendations

Our report also contains recommendations concerning the board's office space and the control over county board expenses. The chairman and the board substantially agreed with these recommendations.

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APPOINTIVE AND ADMINISTRATIVE OFFICIALS

STATE TAX APPEAL BOARD

		<u>Term Expires</u>
Ray J. Wayrynen	Chairman	March 1, 1977
Helen M. Peterson	Member	March 1, 1979
Robert S. Raundal	Member	March 1, 1981
Vernon B. Miller	Administrative Officer	

SUMMARY OF RECOMMENDATIONS

As a separate section in the front of each audit report we include a listing of all recommendations together with a notation as to whether the agency concurs or does not concur with each recommendation. This listing serves as a means of summarizing the recommendations contained in the report and the audited agency's reply thereto and also as a ready reference to the supporting comments. The Chairman and Board Members chose to respond separately to the audit report.

	<u>Page</u>
Comply with Montana statutes relating to vacation, sick leave and a 40 hour work week.	6

Agency Reply:

The Chairman disagrees. See page 28.
The Board Members concur. See page 38.

Additional auditor's comments are on page 40.

Assign the chairman the responsibility and authority for handling the day-to-day administration of the agency.

7

Agency Reply:

The Chairman concurs. See page 29.
The Board Members concur. See page 38.

Execute a written contract with its retained attorney stating his duties and the basis for other charges.

7

Agency Reply:

The Chairman concurs. See page 29.
The Board Members concur. See page 38.

Establish a system of documenting the time and nature of services provided by the attorney and determine if attorney costs could be lowered by implementing hourly rates.

7

Agency Reply:

The Chairman disagrees. See page 29.
The Board Members concur. See page 38.

Consult with the Department of Administration and obtain smaller and more suitable office space.

8

Agency Reply:

The Chairman concurs. See page 29.
The Board Members concur. See page 38.

SUMMARY OF RECOMMENDATIONS (Continued)

	<u>Page</u>
Comply with Section 41-2303, R.C.M. 1947, and discontinue allowing nonexempt employees to accumulate compensatory time balances.	10
<u>Agency Reply:</u>	
The Chairman concurs. See page 30. The Board Members concur. See page 39.	
Comply with Management Memo 1-75-17A by recording compensatory time for exempt employees in full hour units.	10
<u>Agency Reply:</u>	
The Chairman concurs. See page 30. The Board Members concur. See page 39.	
Document the authorization for any unusual changes affecting board time records.	10
<u>Agency Reply:</u>	
The Chairman concurs. See page 30. The Board Members concur. See page 39.	
Follow its policy for approval of time records.	11
<u>Agency Reply:</u>	
The Chairman concurs. See page 30. The Board Members concur. See page 39.	
Comply with Section 1-0304.81, Montana Administrative Manual, by requiring leave of absence forms to be completed on a timely basis.	11
<u>Agency Reply:</u>	
The Chairman concurs. See page 30. The Board Members concur. See page 39.	
Require county tax appeal boards to approve all county expenses before submitting them to the State Tax Appeal Board.	12
<u>Agency Reply:</u>	
The Chairman concurs. See page 30. The Board Members concur. See page 39.	

SUMMARY OF RECOMMENDATIONS (Continued)

	<u>Page</u>
Discontinue the practice of using pre-signed travel claims.	12

Agency Reply:

The Chairman concurs. See page 30.
The Board Members concur. See page 39.

STATE OF MONTANA

Office of the Legislative Auditor

STATE CAPITOL
HELENA, MONTANA 59601
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DEPUTY LEGISLATIVE AUDITORS:

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JOHN W. NORTHEY



MORRIS L. BRUSETT
LEGISLATIVE AUDITOR

The Legislative Audit Committee
of the Montana State Legislature:

We have examined the balance sheet of the State Tax Appeal Board as of June 30, 1976, and the related statements of operations listed in the table of contents of this report for the year then ended. Our examination was made in accordance with generally accepted auditing standards and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the aforementioned financial statements present fairly the financial position of the State Tax Appeal Board as of June 30, 1976, and the results of its operations and changes in fund balances for the year then ended in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

Respectfully submitted,

Morris L. Brusett

Morris L. Brusett, C.P.A.
Legislative Auditor

August 18, 1976

COMMENTS

GENERAL

Article VIII, Section 7, of the Montana Constitution states, "The legislature shall provide independent appeal procedures for taxpayer grievances about appraisals, assessments, equalization and taxes" and "shall include a review procedure at the local government unit level."

The 43rd Legislature implemented the constitutional mandate in 1973 by abolishing the State Board of Equalization and creating the State Tax Appeal Board along with a county tax appeal board in each county. The county boards consist of three members appointed by the county commissioners for four year terms.

The members of the State Board of Equalization constituted the first three members of the State Tax Appeals Board. The members are appointed by the governor, with the advice and consent of the senate for staggered six-year terms, with the governor also designating one member to be chairman of the state board.

The county and state boards act independent of and are not associated nor affiliated with the state property assessing and taxing authority, the Montana Department of Revenue. The boards serve as agencies where any taxpayer may protest valuation, assessment, classification or equalization of his property (and the resulting tax) and make such protest at a minimum of trouble and expense. The boards have the authority to order changes or adjustments when they believe they are justified.

The duties of the State Tax Appeal Board include: (1) prescribing rules and regulations for county tax appeal boards, (2) hearing appeals from decisions of the county tax appeal boards, and (3) hearing appeals from decisions of the Department of Revenue in regard to business licenses,

property assessments, taxes and penalties. The decisions of the state board are final, subject only to judicial review.

The board is allocated to the Department of Administration for administrative purposes. Under the Executive Reorganization Act of 1971, the board exercises its policy making functions independently of the department and without approval or control of the department. The Department of Administration directs and supervises the budgeting, recordkeeping, reporting and related administrative and clerical functions of the board. However, the board hires its own personnel.

BOARD DUTIES

Section 84-702, R.C.M. 1947, discusses the qualifications and compensation of State Tax Appeal Board members. This section states, in part, "He shall devote his entire time to the duties of the office." Section 84-703, R.C.M. 1947, discusses the organization of the board. It states in part, "It shall be in continuous session and open for the transaction of business every day except Saturdays, Sundays, and legal holidays." These laws make the State Tax Appeal Board a full time board; however, the need for a full time board does not appear to be justified by the board's work load.

A review of fiscal year 1975-76 appeals shows 144 appeals were heard during the fiscal year. Of the hearings, approximately 89 percent were conducted in the last four months of 1975. The hearings are concentrated into the last four months of the year because of regulations concerning county boards. Substantially all of the hearings conducted by the state board have been previously heard by county tax appeal boards. The county boards are allowed to hear appeals from the third Monday in June until the second Monday in August. Thus, the state board

holds most of its hearings from the end of August until November 30.

The state board attempts to make decisions on all appeals by November 30, because tax payments are due on that date. The concentration of appeals into a four-month period is evidence that a full-time State Tax Appeal Board is not necessary. The cost of salary and benefits for board members in fiscal year 1975-76 was \$62,479.

The board currently has three persons employed in support positions. Based on the workload of the board, this staff size does not appear to be justified. The State Personnel Division reviewed the duties of these employees for placement into the state classification and pay plan. Some duties which should require the efforts of one person are listed as being performed by more than one employee. For example, two employees list the duty of taking minutes at board meetings; two employees indicate that they make reservations for out-of-town meetings; and two employees are responsible for processing and maintaining the board's accounting records. Each employee indicated that some time was spent assisting with board hearings and issuing board orders; however, 89 percent of the board's hearings were conducted in a four month period. The cost of salary and benefits for the support staff was \$39,985.

Montana's Constitution requires an independent appeal procedure for taxpayers; however, the cost of the present State Tax Appeal Board may not be justified. The needs of taxpayers might be served, at a much lower cost, if the State Tax Appeal Board were converted to a part-time board. The board could meet on a continuing basis during the primary appeal season and perhaps once or twice a month, as needed, for the remainder of the year. The staff needs of the board could be fulfilled

by one staff member. If more support were needed during the primary appeal season, the board could hire part-time secretarial help.

There are various problems which might result from a part-time board. A part-time board might not be able to gather the knowledge necessary to make sound judgments on difficult tax questions. It may be difficult to obtain board members who would be willing to serve on a part-time basis and regional representation on the board might be difficult to obtain because of the large number of miles involved in traveling to meetings. A part-time board also may have difficulties in obtaining adequate support staff which would serve on a part-time basis.

If a part-time board is not feasible, the full time board should assume many of the duties performed by the present support staff. This might include the review of accounting records, preparation of budgets, and the preparation and submission of board minutes for typing. The staff needs of the board could then be fulfilled by one staff member for the majority of the year. The board could also assume other duties if assigned by the legislature. The need for a full-time board with the present support staff should be the subject of further legislative review. Since this subject requires a more comprehensive review beyond the scope of this audit, we make no recommendations.

WORKING HOURS

Board members often do not appear at work for an eight-hour day, and on many days they do not appear at all. Absences are not charged to vacation, sick leave, or compensatory time off.

The board does not maintain leave records or work full time because they consider themselves to be officers of the state. The law creating

the board does not specify whether board members are officers of the state or employees of the state.

We requested an Attorney General's opinion on this matter, and the opinion is included on page 20 of this report. The opinion states that board members may generally be considered public officers, but for the specific purpose of determining the applicability of state vacation, sick leave, and working hour statutes, they must be considered state employees who are subject to the provisions of these particular statutes.

RECOMMENDATION

We recommend that the board comply with Montana statutes relating to vacation, sick leave and a 40 hour work week.

BOARD ADMINISTRATION

The State Tax Appeal Board consists of three members, and a majority vote decides all board rulings and orders. The board also makes internal policies and administrative decisions in this manner. This policy has caused some unneeded delays in the handling of administrative matters.

In December 1975, the executive secretary noted a discrepancy in an employee's time record. A decision was needed on whether or not to accept overtime hours which supposedly were worked but were not recorded on the employee's time cards. The board did not make a decision on this matter until August 1976. One board member was undecided, and the board could not reach a majority decision. The day to day administration of the office would be better served if the board chairman were given the responsibility and authority for office administration.

RECOMMENDATION

We recommend that the board assign the chairman the responsibility and authority for handling the day-to-day administration of the agency.

ATTORNEY SERVICES

The board retains the services of a practicing attorney at a fee of \$750 per month. The attorney bills the board an additional amount if he is involved in court proceedings. Attorney services for fiscal year 1975-76 totaled \$9,892.60.

The board does not have a written contract with the attorney which specifies services to be provided under the retainer or the basis for other charges. During the period of our audit, the board did obtain a letter from the attorney generally indicating his duties. This, however, is not a legal contract. The board should execute a written contract stating the duties of the attorney and the basis for other charges.

The board does not maintain records documenting the effort, service, or performance of the attorney. A recording system is needed to evaluate the board's use of the attorney and to determine if the board could lower attorney costs by changing to a per hour cost basis.

RECOMMENDATION

We recommend that the board:

1. *Execute a written contract with its retained attorney stating his duties and the basis for other charges.*
2. *Establish a system of documenting the time and nature of services provided by the attorney and determine if attorney costs could be lowered by implementing hourly rates.*

OFFICE SPACE

The board has a five-year lease for 2,496 square feet of office space located at the corner of Eleventh and Roberts in Helena. This lease is currently costing over \$12,000 yearly. Six people work at this location: three board members and three support staff. Analyses made by Architecture and Engineering Bureau staff show that only approximately one-half of the board's present space is needed for six employees. Accordingly, the board leases an excessive amount of space for such a small agency. The board has considered this matter and has discussed it in the past; however, the board has not located other quarters. The board should consult with the Department of Administration and obtain more modest quarters at a lower cost.

RECOMMENDATION

We recommend that the board consult with the Department of Administration and obtain smaller and more suitable office space.

EMPLOYEE LEAVE

Certain compensation requirements for state employees are described in Section 41-2303, R.C.M. 1947. This section in part states, "No employer shall employ any of his employees for a work week longer than forty (40) hours unless such employee receives compensation for his employment in excess of forty (40) hours in a work week at a rate of not less than one and one-half (1-1/2) times the hourly wage rate at which he is employed." Section 41-2304, R.C.M. 1947, lists exceptions to the previously stated law. Any type of employee not listed as an exception is subject to the overtime pay law.

The board has not been in compliance with this law. They have allowed nonexempt state employees to accumulate compensatory time balances. The board's nonexempt employees should have received pay at time and one-half for any hours over 40 per work week. The nonexempt employees were compensated with straight time off instead of being paid at one and one-half times their rate of pay. These nonexempt employees are entitled to one-half time pay for any hours taken off and one and one-half time pay for overtime balances currently recorded.

Our review of compensatory time revealed two unusual compensatory time recordings. In May 1975 the administrative officer received 83 hours of retroactive compensatory time. He received these hours because he stayed at the office during noon hours and was available to answer any phone calls. We could find no evidence in the board minutes to substantiate this adjustment. The members of the board remember authorizing the adjustment but none of them could remember the exact number of hours given. The board should substantiate adjustments of this nature in the minutes, documenting the amount of the adjustments and the reasons for such adjustments.

The board's policy for recording hours worked requires the administrative officer to approve the time cards for the two office secretaries. The executive secretary's time card is approved by any two board members. This policy is not always followed. In December 1975, one board member authorized the secretary who keeps the time records to add 57½ hours to another employee's leave record. This was done without the knowledge of the administrative officer or the other board members. The hours in question were not claimed by the secretary on her time cards, which were previously approved.

The secretary stated that her job duties are such that she does not have the time to properly complete her time cards. Although the board member who authorized the changes believes the hours were worked, we could not verify this time. This problem would not have occurred if the board had followed its time card approval policy or if the secretary had completed her time card properly.

Our review of time records indicated other weaknesses. Section 1-0304.81, Montana Administrative Manual, states, "Employees will inform their immediate supervisor of their absence as soon as practical and not wait until they return to work." Board policy allows employees to submit a request for leave of absence form at the end of each month.

Management Memo 1-75-17A states "compensatory time earned and taken shall be recorded in full hours only." The board allows its employees to earn and take compensation in fractions of an hour.

Board employees often complete time cards in pencil. Not all time cards have supervisory approval. Time cards should be completed in ink, and all time cards should be properly approved.

RECOMMENDATION

We recommend that the board:

1. *Comply with Section 41-2303, R.C.M. 1947, and discontinue allowing nonexempt employees to accumulate compensatory time balances.*
2. *Comply with Management Memo 1-75-17A by recording compensatory time for exempt employees in full hour units.*
3. *Document the authorization for any unusual changes affecting board time records.*

4. Follow its policy for approval of time records.
5. Comply with Section 1-0304.81, Montana Administrative Manual, by requiring leave of absence forms to be completed on a timely basis.

COUNTY BOARD EXPENSES

The board has the authority and responsibility to pay compensation, travel expenses and incidental expenses of county tax appeal boards. Supplies and secretarial wages represent a large portion of their expenses. The manner in which these expenses have been approved has not been adequate.

County tax appeal boards hold meetings in June, July, and August to hear taxpayer appeals. The boards hire secretaries to record the appeals and to prepare board minutes. The secretaries then submit claims to the State Tax Appeal Board for payment. The executive secretary at the state board then reviews and approves the claims. Frequently, however, the claims do not indicate if the county boards reviewed or approved the claims.

In one instance a county board, which employed a secretary, was unaware of the secretary's hourly rate of pay. County board members receive the goods and services paid for by the state board; therefore, county board members are in the best position to judge if a claim is reasonable and should be approved. The board would significantly improve expenditure control if county board members approved claims before submitting them to the State Tax Appeal Board.

Each year the board has conferences in various regions of the state so that county board members may receive answers to questions they have

concerning county appeals. A board member maintains a supply of blank travel claims which the county board members sign to seek reimbursement for their travel expenses relating to the conferences. The county board members then sign a separate sheet and indicate their travel expenses. The county board members receive \$25 per day and 15 cents for each mile traveled to the meeting. These forms are returned to Helena where a state board secretary completes the travel claims. In our review of board files we discovered a blank pre-signed travel expense claim which a county board member had given to the state board so that, in the event he made errors on future claims, the board could correctly complete the pre-signed form.

These procedures result in poor control and needless work. The state board should consider submitting multiple vendor invoices for these claims which would preclude the need for pre-signed travel claims. If this is not feasible the county board members should prepare their own travel claims which should then be reviewed by the board.

RECOMMENDATION

We recommend that the board:

1. *Require county tax appeal boards to approve all county expenses before submitting them to the State Tax Appeal Board.*
2. *Discontinue the practice of using pre-signed travel claims.*

FINAL COMMENTS

We have reviewed this report with the chairman and the members of the State Tax Appeal Board. The full text of the chairman's written response to the report begins on page 25. The response of the board members begins on page 34.

We wish to express our appreciation to these officials and their staff for cooperation and assistance during the audit.

FINANCIAL STATEMENTS

STATE TAX APPEAL BOARDBALANCE SHEET - GENERAL FUNDJune 30, 1976

ASSETS

Appropriation Reserved for Payment of Accrued Support Expenditures	<u>\$6,424</u>
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LIABILITIES

Accrued Support Expenditures	\$6,424
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FUND BALANCE	<u>-0-</u>
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TOTAL LIABILITIES AND FUND BALANCE	<u>\$6,424</u>
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(See accompanying notes)

STATE TAX APPEAL BOARDSTATEMENT OF EXPENDITURES BY PROGRAM
COMPARED WITH APPROPRIATIONGENERAL FUNDFiscal Year Ended June 30, 1976Administration Program

Personal Services	
Salaries	\$ 91,844
Other Compensation	25,375
Employee Benefits	<u>10,621</u>
	<u>127,840</u>
Operating Expenses	
Contracted Services	29,142
Supplies and Materials	1,419
Communications	2,488
Travel	7,980
Rent	12,187
Repair and Maintenance	<u>277</u>
	<u>53,493</u>
Equipment	<u>173</u>
Total Expenditures	<u>\$181,506</u>
Appropriation	<u>\$232,515</u>
Unexpended Balance	<u>\$ 51,009</u>

(See accompanying notes)

STATE TAX APPEAL BOARDSTATEMENT OF CHANGES IN FUND BALANCE - GENERAL FUNDFor Year Ended June 30, 1976

Beginning Balance, July 1, 1976 \$ -0-

Additions

Appropriation from the General Fund 232,515

Total Available 232,515

Deductions

Expenditures \$ 181,506

Reverted Appropriation 51,009

Total Deductions 232,515

Fund Balance - June 30, 1976 \$ -0-

(See accompanying notes)

STATE TAX APPEAL BOARDSTATEMENT OF CHANGES IN GENERAL FIXED ASSETSFiscal Year Ended June 30, 1976

Beginning Balance, July 1, 1975	\$11,847
Additions:	
Equipment	<u>173</u>
Ending Balance, June 30, 1976	<u>\$12,020</u>

STATE TAX APPEAL BOARDNOTES TO FINANCIAL STATEMENTSFiscal Year Ended June 30, 19761. Summary of Significant Accounting Policies

The preceding financial statements were prepared from the Statewide Budgeting and Accounting System with the exception of the financial statement for general fixed assets. The Statewide Budgeting and Accounting System does not include a system of recording general fixed assets. The financial statements for general fixed assets were prepared from agency records.

The State of Montana utilizes the modified accrual basis of accounting. Modified accrual is defined as "that method of accounting in which expenditures are recorded on the basis of valid obligations and revenues are recorded when received in cash. At the end of a fiscal year, all valid obligations against an appropriation are to be accrued as expenditures as provided by the law." (Montana Administrative Manual, 2-0240.40.)

2. Retirement Plan

The board's employees are covered by the Public Employees' Retirement System, a contributory plan under which the state contributes 5.55 percent of an employee's gross wages and the employee contributes 6 percent of his gross wages to the plan. The agency incurred pension costs of \$4,776 during fiscal year 1975-76. The state's policy is to fund accrued pension costs.

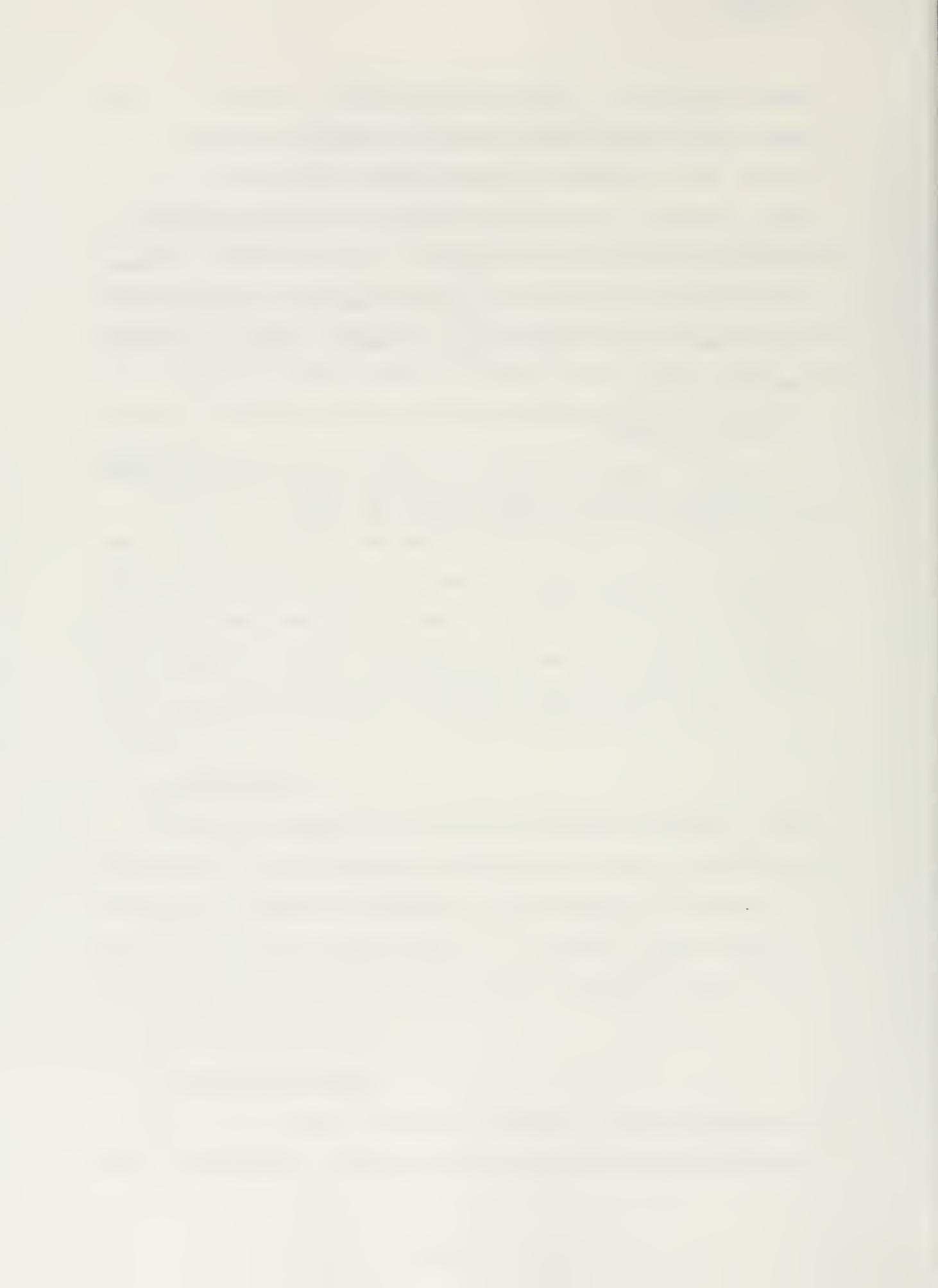
3. Vacation and Sick Pay

Liabilities incurred because of employees' unused vacation and sick pay are not recorded. The related expenditures are recorded when paid.

Permanent employees are allowed to accumulate and carry over into a new calendar year a maximum of two times their annual accumulation of vacation. Upon termination, qualifying permanent employees having unused accumulated vacation and sick leave receive payment for vacation on a 100 percent basis and sick leave on a 25 percent basis. The amount of the liability associated with unused, accumulated vacation and sick leave at June 30, 1976, is not readily determinable under the statewide accounting system.

4. Lease Commitment

The board leases office space at an annual rate of \$4.88 per square foot. The lease agreement expires October 15, 1978.



APPENDIX



BERT L. WOODAHL
ATTORNEY GENERAL

State of Montana
Office of The Attorney General
STATE CAPITOL
HELENA, MONTANA 59601

SEP 15 1976

STATE LEGISLATIVE AUDITOR

VOLUME NO. 36

OPINION NO. 100

STATE ELECTED OFFICIALS, EMPLOYEES, AND APPOINTEES - Appointed state officials are state employees for purposes of the vacation, sick leave and working hours statutes - VACATIONS, PUBLIC EMPLOYEES - Appointed state officials are state employees for purposes of the vacation statutes - SICK LEAVE, PUBLIC EMPLOYEES - Appointed state officials are state employees for purposes of the sick leave statutes - WORKING HOURS, PUBLIC EMPLOYEES - Appointed state officials are state employees for purposes of the working hours statutes - STATE TAX APPEALS BOARD - STAB members are public officials, but for the specific purposes of vacation leave, sick leave, and working hours statutes, they are state employees. Section 59-510(1), 59-1001, 59-1007, 59-1008, Revised Codes of Montana, 1947.

HELD: State Tax Appeals Board members may generally be considered public officers, but for the specific purposes of determining the applicability of Montana vacation, sick leave, and working hour statutes, they are to be considered state employees who are subject to the provisions of Chapter 10, Title 59, R.C.M. 1947, and §59-510(1), R.C.M. 1947.

September 14, 1976

Mr. Morris L. Brusett
Legislative Auditor
State Capitol
Helena, Montana 59601

Dear Mr. Brusett:

You have requested my opinion concerning the following questions:

1. Are members of the State Tax Appeals Board (STAB) employees of the state or officers of the state?
2. Do vacation and sick leave laws apply to STAB members or are they free to work whatever hours they please?

STAB members consider themselves state officials rather than state employees. They do not receive vacation, compensatory time, or sick leave, but keep their own hours. They are paid a yearly salary with no consideration given to the actual number of hours worked.

One board member, prior to his appointment, was employed by another state agency. Upon his appointment to the board he received a lump sum payment for accrued vacation and sick leave. This action was taken upon receipt of an opinion from the board's attorney finding the board member became a public officer rather than an employee upon appointment to the board.

In State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P.2d 411 (1927), the Montana Supreme Court stated:

"***we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they are those of an inferior or subordinate officer, created or authorized by the Legislature and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional." 79 Mont. at 528.

These five elements were reaffirmed in State ex rel. Running v. Jacobson, 140 Mont. 221, 370 P.2d 483 (1962).

STAB is creature of the legislature, created pursuant to §84-701,

R.C.M. 1947, with a continuing life and six year terms for board members; therefore, the requirements of the first and fifth elements are met. Section 84-708, R.C.M. 1947, sets forth the power and duties of STAB and provides that the board does exercise a portion of the sovereign power of the state without control of a superior power. Therefore, the requirements of the second, third and fourth elements are met. For general purposes, STAB members are public officers.

Notwithstanding the above general statement regarding the status of STAB members, it is necessary to review the specific provisions relating to vacation and sick leave to determine whether they apply to STAB members.

Section 59-1001, R.C.M. 1947, provides in pertinent part:

"(1) Each full-time employee of the state...is entitled to and shall earn annual vacation leave credits..."

Section 59-1007, R.C.M. 1947, provides:

"The term 'employee' as used herein, does not refer to or include elected state, county or city officials, or schoolteachers." (emphasis added)

Both sections 59-1001 and 59-1007, R.C.M. 1947, were originally enacted by Chapter 131, Session Laws of 1949.

Section 59-1008, R.C.M. 1947, provides in part:

"(1) Each full-time employee of the state...is entitled to and shall earn sick leave credits..."

In determining which employees are excluded from the sick leave provisions of the Montana statutes, Vol. 34, Opinions of the Attorney General, No. 12, states:

"Therefore...it is my opinion that the exclusion of certain employees provided in section 59-1007, R.C.M. 1947, is applicable to the statute providing for sick leave, Chapter 93, Session Laws of 1971, section 59-1008, R.C.M. 1947."

Therefore, in determining who is excluded from the coverage of vacation and sick leave laws, §59-1007, R.C.M. 1947, is controlling.

In Teamsters v. Cascade County School District, No. 1, 162 Mont. 277, 511 P.2d 339 (1973), the Montana Supreme Court, interpreting the Montana employee vacation statutes, stated:

"The legislature used the term 'employee' in its generic

sense to include all employees of the state or employees of the state agencies of which a school district is included. This interpretation is given further support by the language of section 59-1007 R.C.M. 1947, wherein schoolteachers are specifically excluded. The non-teaching school district employees are included by the definition of employees as used in section 59-1001, R.C.M. 1947." 162 Mont. at 280, 281.

"Elected state officials" are specifically excluded from Montana vacation and sick leave laws by §59-1007, R.C.M. 1947. However, there is no similar exclusion for appointed state officials. It is a rule of statutory construction that express mention of one thing in a statute implies exclusion of another under the maxim "*expressio unis est exclusio alterius*". Helena Valley Irrigation District v. State Highway Commission, 150 Mont. 197, 433 P.2d 791 (1967). Stephens v. City of Great Falls, 119 Mont. 368, 175 P.2d 408 (1947). Applying this rule with the rationale of the court in the Teamsters case above, by only excluding elected officials, the legislature is presumed to have intended to include appointed public officials under the vacation and sick leave laws. Therefore, STAB members are also subject to the Montana vacation and sick leave laws and regulations.

Sections 59-1003 and 59-1008(5), R.C.M. 1947, pertaining respectively to vacation and sick leave, provide that accrued vacation and sick leave transfer with an employee who transfers between agencies within the state government. Therefore, since appointed public officers are not excluded from the coverage of these statutes, any lump sum payment of such previously accrued benefits to a board member upon his appointment to the board would be contrary to law.

The hours of work of state employees are specified by section 59-510(1), R.C.M. 1947, which provides in part:

"All salaried state employees shall work a minimum of forty (40) hours a week."

There is an exception to elected officials, in that they are not required to maintain specific working hours, but are required to perform their statutory duties. Vol. 21 Opinions of the Attorney General, No. 198. As stated above, STAB members do not qualify for the elected officials' exception. Qualifications of members of STAB are set forth in §84-702, R.C.M. 1947, which provides in part:

"He shall devote his entire time to the duties of the office and shall not hold any position of trust or profit, nor engage in any occupation or business interfering or

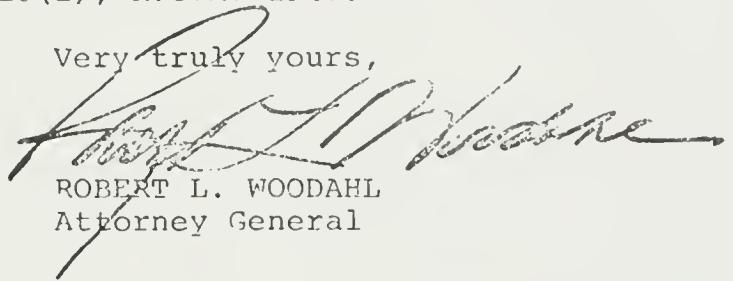
inconsistent with his duties."

Thus, STAB members are considered full time state employees, and as such, are subject to the requirements of §59-510(1), R.C.M. 1947, requiring a 40 hour work week.

THEREFORE IT IS MY OPINION THAT:

State Board of Tax Appeals members may generally be considered public officers, but for the specific purposes of determining the applicability of Montana vacation, sick leave, and working hour statutes they are to be considered state employees who are subject to the provisions of Chapter 10, Title 59, R.C.M. 1947, and §59-510(1), R.C.M. 1947.

Very truly yours,


ROBERT L. WOODAHL
Attorney General

RLW:sp

AGENCY REPLIES



STATE OF MONTANA

STATE TAX APPEAL BOARD

1400 ELEVENTH AVENUE
HELENA, MONTANA 59601
TEL (406) 449-2720

DE 6 10

STATE OF MONTANA

December 6, 1976

Mr. Morris L. Brusett
Legislative Auditor
Capitol Building
Helena, Montana

Dear Morris:

In keeping with your request of December 3, to submit our written reply to your final Audit Report of our Agency, as early as possible, I am enclosing my personal reply.

The members of this Board indicated a desire to submit individual responses. Therefore, mine is transmitted to you at this time and the other two should be forthcoming.

Sincerely,

A handwritten signature in cursive ink that reads "Ray J. Wayrynen".

Ray J. Wayrynen,
Chairman

WRITTEN REPLY TO THE FINAL REPORT
ON THE
AUDIT OF THE STATE TAX APPEAL BOARD
BY
CHAIRMAN, RAY J. WAYRYNEN

The members of the State Tax Appeal Board have indicated a preference to submit individual replies to the Audit Report.

The following comments constitute the personal views of Chairman, Ray J. Wayrynen.

Section 1, General

This section speaks of the Constitutional and statutory structure of the state and county tax appeal system, and appears to be correct in all respects. No comments are necessary.

Section 2, Board Duties

This section deals mainly with the relatively short three year history of the tax appeal system, and raises the question of whether the state Board should be a full time Board or a part time Board.

Considering the length of time that the entire tax appeal system has been in existence it is doubtful that it has reached its full potential in serving the tax paying public. In spite of attempts at public education a large segment of the general public is not aware of tax appeal procedures and how it is to be utilized.

The Report in its consideration of a part time Board appears to recognize many disadvantages and the need for a more comprehensive review before any decision to depart from its present concept.

Due to the lack of any specific Report recommendation in this area, this writer would reserve any further comment or judgement on the question of full time or part time Board.

This section of the Report refers to certain duties of staff personnel and some reply is indicated.

As to the examples of two employees performing the same duties the Auditor is obviously confused between daily Board business meetings and actual tax appeal hearings.

In the first example, the Executive Secretary attends the daily Board meetings and takes notes for the Board's minutes. The Hearing Reporter attends the appeal hearings and records the proceedings verbatim. Two entirely separate functions.

In the second example, the Executive Secretary makes arrangements for out of town hearings for the Board. This often entails numerous and time consuming contacts with county or local officials to locate suitable facilities for a particular time. The Hearing Reporter, who travels with the Board on these occasions might merely make hotel or motel reservations for the group. Here again--no duplication of effort.

As to account records, claims, etc., the Executive Secretary reviews and approves or corrects the documents and then an Administrative Aide does the necessary typing and processing.

The final comment on this Section has to do with the suggestion that a full time Board might assume the duties now performed by the Executive Secretary.

This suggestion is completely repugnant to this writer. There is sufficient work in this area that if individual Board members began performing this work, the work would neither be done timely, satisfactorily or in complete detail.

A member of the Audit Staff made the comment that all of the records of this Board, including financial, equipment inventory, Board minutes and others were in excellent condition. In fact much better than most other agencies. This results from making this the responsibility of an experienced, professional, Administrator. This would not be the result if this work was done by Board members who had little or no knowledge of these matters and who very likely would not devote the necessary time to complete details, but merely perform the bare essentials when required of necessity. I completely reject this suggestion.

Section 3, Working Hours¹

I am confident in my own mind that I satisfy the statutory requirements of Section 84-702, "He shall devote his entire time to the duties of the office".

Regarding the Attorney Generals opinion as to whether members of this Board are "public officers" or "state employees", the Report does not state that this Board has an earlier opinion by the Boards Attorney, also acting as a Deputy Attorney General. That opinion is attached to the end of this document.

The two opinions are in conflict, and this writer views them as nothing more then separate legal opinions by two different Attorneys.

The opinion by Attorney General Woodahl states that members of this Board satisfy all of the five essential elements of being public officials--but for some purposes we should be state employees. I find such logic difficult to accept. We should be either one or the other--not public officials for one purpose and state employees for another.

The opinion by Attorney Smith is the earlier opinion, and the one that has been accepted and relied upon by this Board.

There is a good possibility that if an opinion was requested of the new Attorney General that it may differ from the others.

Therefore, this Board will in all probability continue as it has in the past until this question of public official versus state employee is defined either by a court of competent jurisdiction or the Legislature.

In doing so this writer rejects the Audit Report's recommendation to this Section.

¹ Auditor's comments on chairman's reply are on page 40.

Section 4, Board Administration

The procedure suggested by the report is the method originally followed by this Board. On the insistence of a New Board member in early 1975, and on support of the other member the original policy has been departed from, resulting in some disruption and needless delay in routine administrative functions. This writer agrees with the Report's recommendation and urges Board concurrence.

Section 5, Attorney Services

This section is substantially correct as to facts. The Board does have a letter of agreement from its Attorney and to convert this document into contract form is a simple matter.

As to the cost of legal services, the Chairman has almost daily contact with the Attorney, and the other Board members and staff personnel consult the Attorney regularly as need requires. The Attorney also attends tax appeal hearings whenever the Board feels his presence is desireable.

I am satisfied that we receive full value from the retained Attorney on the present basis, and it seems that to keep records documenting efforts, services and performance of the Attorney would be unnecessary, time consuming paperwork.

Section 6, Office Space

On the surface it may appear that this agency occupies more than average amount of space.

It must be remembered that when this Board came into existence, there was no criteria by which to measure its needs. This applies to all subjects -- including staff, funds, etc., as well as space. I believe most everyone would agree that to work effectively the Board members should have individual, private offices. Two members offices are approximately 140 square feet in area. The Chairman's office is somewhat larger due to the fact that there is more traffic in that office. The staff work area is intended for use by one more person then is now employed. This need has not occured yet--but could happen in the not to distant future.

The other large area is the Conference Room used for the Board's tax appeal hearings. This space must be of sufficient size to accomodate anywhere from six to twenty persons during hearings. The present conference Room is very suitable for its intended use.

While this Board does pay the rent for the Conference Room, the Department of Administration has instructed us to make if available to other state agencies when not being used by this Board, and it is therefore frequently used by others and is not always idle when it is not in use by the Tax Appeal Board.

The actual arrangement of space is perhaps not the most desireable, but the same problem could be present any place.

The present lease extends until October 1978, and whether the Tax Appeal Board occupies this space or some other is a determination that is to be made by the Department of Administration.

Section 7, Employee Leave

This Section mentions some situations that have existed in the past, but have been or are being corrected.

A review of the Administrative Officer receiving 83 hours of retro-active compensatory time appears necessary.

For a certain period of time this employee was on duty from 7:30 a.m. to 5:00 p.m.--having his lunch at his desk while taking care of whatever occurred during the lunch hour, such as phone calls or people coming into the general office area. That actually amounted to 9½ hours daily.

There was no complaint by the employee, but the Board felt that he should be compensated for the extra hours. Being an exempt employee, he was entitled to earn compensatory time, and after proper calculations he was awarded the 83 hours which he used on a 1 to 1 basis. This entire matter was properly authorized and documented in the employees records, and is referred to in the Board minutes for May 12, 1975.

The other matter of one Board member authorizing 57½ hours to another employee's leave record, is the type of thing that occurs when administrative authority is fragmented, rather than vested solely with one person, as recommended in Section 4, Board Administration, of this Report.

The problem in question was resolved and measures taken to prevent the re-occurrence of such events.

I'm confident that there will be substantial compliance to the recommendations in the future.

Section 8, County Board Expenses

I would agree with the text of this Section as well as the recommendations, and I am confident there will be complete compliance in the future.

December 6, 1976
DATED

Ray J. Wayrynen
RAY J. WAYRYNEN, Chairman



STATE OF MONTANA

STATE TAX APPEAL BOARD

1400 ELEVENTH AVENUE
HELENA, MONTANA 59601

TEL (406) 449-2720

March 7, 1975

MEMORANDUM OPINION

TO: Bob Raundal, Member, State Tax Appeal Board
FROM: Charles A. Smith, State Tax Appeal Board Attorney
RE: Cash compensation for unused vacation and sick leave.

You have requested my opinion as to whether you are entitled to cash compensation for the unused vacation and sick leave you accrued while an employee with the Department of State Lands prior to your appointment as a member of the State Tax Appeal Board.

Chapter 10, Title 59, of the Revised Codes of Montana, 1947, provides for vacation and sick leave of state employees and the accumulation thereof. Sections 59-1003 and 59-1008 give the state employee the right to receive cash compensation for his accrued vacation and sick leave, respectively, upon termination of his employment. These sections further provide that if an employee transfers between agencies he is not entitled to cash compensation. Instead, the receiving agency assumes liability for any accrued vacation or sick leave.

You terminated your employment with the Department of State Lands on February 28, 1975, in order to accept an appointment by the Governor as a member of the State Tax Appeal Board for a term of six years made pursuant to Section 84-701. Thus, in order to answer your question it is first necessary to examine your present status in light of the foregoing sections and Chapter 10 of Title 59. Are you presently an "employee" and is your appointment a "transfer between agencies" as those terms are used in Chapter 10 of Title 59?

Section 59-1007.1 enacted in 1973 defines "employee" as "any person employed by the state....." and defines "transfer" as a "change of employment from one agency to another agency". There is nothing in Chapter 10 of Title 59 that specifically

Page 2
March 7, 1975
Bob Raundal

includes a member of a board appointed by the Governor, such as yourself, within the meaning of the term "employee". Black's Law Dictionary defines "employment" as "the act of hiring, implying a request and a contract for compensation". (Emphasis supplied) The author notes under the definition of "employee" that "'Employee' must be distinguished from 'independent contractor', 'officer', 'vice-principal', 'agent', etc. The term is often specifically defined by statutes; and whether one is an employee or not within a particular statute will depend upon facts and circumstances." (See numerous cases cited by author.)

A public office is not a contract and an appointment to a public office does not establish a contract relation between the person appointed and the public. 63 Am Jur 2d, Public Officers and Employees, §10, pp. 632-633. Furthermore, the courts have consistently held that there is a distinction between a public office and a public employment. Unless expressly included as an employee within a statute, a public officer is not an employee. 63 Am Jur 2d, supra, §11, pp. 633-634. This principle has been followed by the Montana Supreme Court in numerous cases. State ex rel Running v. Jacobson, 140 Montana Reports 221, 370 P.2d 483 (1962).

In the Running case, the Montana Supreme Court stated:

In the case of State ex rel. Barney v. Hawkins, 79 Mont. 506, 528, 257 P. 411, 418, 53 A.L.R. 583, this court stated:

"* * * we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature and by it placed under the general

Page 3
March 7, 1975
Bob Raundal

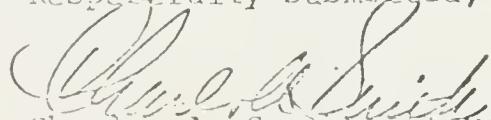
control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional. In addition, in this state, an officer must take and file an official oath, hold a commission or other written authority, and give an official bond, if the latter be required by proper authority." Emphasis supplied. See also State ex rel. Nagle v. Page, 98 Mont. 14, 37 P.2d 575; State ex rel Nagle v. Kelsey, 102 Mont. 8, 55 P.2d 685; State ex rel. Dunn v. Ayers, 112 Mont. 120, 113 P.2d 785.

If any one of the five elements, recited in State ex rel. Barney v. Hawkins, *supra*, is absent in a public service position, such position is an employment and not a public office, and the occupant thereof is an employee and not an officer. All the elements must be present.

All five of the elements required by the Barney case are present in your position as a member of the State Tax Appeal Board. Therefore, under the Montana Supreme Court decisions cited above, your position is a public office and you are an officer and not an employee. Although the act does not specifically except appointive members of a board, such as yourself, from the act as it does elected State officers, such an exception is not required and would merely be redundant in the view of the above Montana Supreme Court decisions.

Therefore, it is my opinion that your employment within the meaning of Chapter 10, Title 59, terminated when you ceased your employment with the Department of State Lands and commenced your term of office as a member of the State Tax Appeal Board. The acceptance of your appointment does not constitute a "transfer" within the meaning of the act but rather a change in your status as an "employee" to an "officer". Therefore, you are entitled to cash compensation for unused vacation and sick leave.

Respectfully submitted,



Charles A. Smith, Attorney for
State Tax Appeal Board and
Ass't. Attorney General

CAS:slr



STATE OF MONTANA

STATE TAX APPEAL BOARD

1400 ELEVENTH AVENUE

HELENA, MONTANA 59601

TEL (406) 449-2720

December 8, 1976

Morris L. Brusett
Legislative Auditor
State Capitol
Helena, Montana 59601

Dear Mr. Brusett,

As members of the State Tax Appeal Board, we are submitting our comments jointly on the final report on the audit of the State Tax Appeal Board.

We find we are in agreement in almost all areas in regard to the audit, and that our positions are so similar that we believe this joint comment is the most desirable way to let you know our opinions.

Sincerely,

A handwritten signature in cursive ink that appears to read "Helen M. Peterson".

Helen M. Peterson, Member
State Tax Appeal Board

A handwritten signature in cursive ink that appears to read "Robert S. Raundal".

Robert S. Raundal, Member
State Tax Appeal Board

AUDIT OF THE STATE TAX APPEAL BOARD
BY THE LEGISLATIVE AUDITOR

COMMENTS BY
HELEN M. PETERSON and ROBERT S. RAUNDAL
MEMBERS, STATE TAX APPEAL BOARD

As requested in Morris Brusett's letter of December 3, 1976, these comments will take the Legislative Audit report section by section.

GENERAL

This material is factual and accurate.

BOARD DUTIES

We agree with some of the comments in this section; with others, we cannot agree.

We believe one statement near the bottom of page 3 of the audit report gives a false impression. Although the majority of the hearings are on appeals previously heard by county tax appeal boards, our longest, most complicated, and most time-consuming hearings are on direct appeal from decisions of the Department of Revenue. These are almost always concerned with large industries and are involved with inter-county property, corporation license tax, and the like. The direct appeals are those in which by far highest dollar values are involved. The liquor hearings are also direct appeals not heard by the county boards.

We also believe any suggestion that this be made a part-time board ought to be accompanied with some definite and detailed plan as to how such a part-time board would be organized and would operate.

We may well be overstaffed, and we propose to eliminate one position immediately. We doubt very much, however, whether one staff member will be sufficient. All three appeal board members and the hearing reporter must be present at all hearings. Therefore, it is necessary to have someone who is familiar with the board's activities and functions, at least to some degree, in the office during hearings. It seems probable that we could eventually function with one full-time and one part-time staff member, and we shall be working toward that end.

We concur in your suggestion that board members should assume the duties now performed by at least one staff member and find your specific comments in this area logical.

We would welcome any other duties which the Legislature would choose to assign us.

In this connection, we checked the values involved in our hearings during the calendar year 1976 to date. We found that the appraised values involved were more than \$850,000,000.00. This does not include appeals settled at the county level, nor does it include any appeals which were processed in this office, but not heard because of withdrawals or for other reasons. Viewed in this light, our budget really does not appear excessive.

We consider it unfortunate that the audit was performed at the time of year that is slowest for the State Tax Appeal Board.

WORKING HOURS

We have checked the minutes of the board for a twelve months period from November 1, 1975 to November 1, 1976.

This period was selected because it is the most recent available to us. During this time, Mr. Raundal had major health problems, including heart surgery; and Mrs. Peterson suffered a fall which resulted in a severe leg injury, and also was forced to be absent from the office with pneumonia for nearly two weeks. These were abnormal absences.

We found, as a result of our perusal of the minutes, that there were 250 working days in this period. Mr. Raundal was present 198 of these days and absent on 52 of them. Mrs. Peterson was present for 212 working days and absent for 38 working days.

On many of the absent days, both of us had files and/or tape recordings of hearings at home, and worked as we felt able to do so. By this means, Mr. Raundal was able to participate in many decisions on appeals that he was unable to hear in person. We also kept in close touch with the office by telephone whenever it was at all possible.

We have attempted to see to it that at least one board member is in the office at all times.

We do not feel that, under the circumstances, your comment regarding board members not appearing on many days is entirely accurate.

In addition, all board members have taken work home on evenings and weekends during our busiest season, and some of us have been known to work on Saturdays and holidays. We question whether a part-time board would feel enough devotion to duty to do this sort of thing.

Since our attorney had given us an opinion which appeared to establish that we are "officers of the state" and not "state employees," we did not make any record in regard to the extra

hours worked during and just preceding the tax appeal season.

The work performed by members of this board and its status is somewhat different, in our opinion, from that of the regular state employee. We sit in a quasi-judicial capacity on some very important tax matters. The only other state agency we know of which serves in a comparable manner is the Public Service Commission.

We have discussed this matter of working hours at length. We agree, with some reluctance, to attempt to follow your recommendation.

BOARD ADMINISTRATION

We concur in this recommendation with one reservation. Since the board chairman is appointed rather than elected, we believe the board itself should decide who is to be responsible for day-to-day administration of the office. This would also apply to the assignment to board members of duties which in the past have been performed by staff.

ATTORNEY SERVICES

A written contract with our attorney is no problem. We assumed that the letter of intent signed when Mr. Smith was retained was sufficient. As per your recommendation, he has been instructed to draw up a contract for his legal services. We have no objection to documenting the time and services of our attorney over a period of a year to make the determination you request.

OFFICE SPACE

We heartily concur with this recommendation and had been

seeking to find smaller and more suitable quarters before the audit was initiated.

EMPLOYEE LEAVE

These comments are justified. Steps have already been taken to comply with your recommendations, and we believe they are presently being complied with.

COUNTY BOARD EXPENSES

Again, we agree with your comments. All county boards have been informed that a county board member MUST sign vendor invoices. For the most part, the county boards have been complying quite well. The terms of the present county board members end December 31, 1976, so we will have to continue to educate new county board members in this area. We agree as to the pre-signed travel vouchers.

SUMMARY

The audit was thorough. The auditor, Steven Sikes, who was assigned to this agency, was pleasant and cooperative. We appreciated his courtesy, and we believe that most of the recommendations the office of the Legislative Auditor has made will assist in making this agency more efficient.

* * * * *

AUDITOR'S COMMENTS ON CHAIRMAN'S REPLY

In disagreeing with the section concerning working hours, the chairman of the State Tax Appeal Board is relying on an opinion of the board's retained attorney which directly contradicts a later opinion issued by the Attorney General. In 35 Opinions of the Attorney General, No. 68, it was held that opinions by legal counsel for state agencies which conflict with the Attorney General's opinion should be disregarded. That Attorney General's opinion follows on page 41.

ATTORNEY GENERAL - Opinions, authority to issue, to whom issued, weight of; ATTORNEY GENERAL - Duties, opinions, to whom issued; ATTORNEY GENERAL - Powers, opinions, to whom issued; BOARDS AND COMMISSIONS - Opinions, attorney general, to whom issued, who authorized to issue; COUNTY ATTORNEYS - Attorney general opinions, to whom issued; OFFICES AND OFFICERS - State officers, attorney general opinions, to whom issued; OPINIONS - Attorney general, authority to issue, to whom issued, weight of. Article VI, section 4, Constitution of Montana, 1972; sections 46-104, 60-125F, 66-1017 and 84-401, R.C.M. 1947.

HELD: 1. Only the attorney general has specific authority to issue legal opinions to county attorneys or other agencies of state and county government.

2. Opinions issued by state officers or agencies which conflict with the attorney general's opinion on the same question must yield to the attorney general's opinion.

January 29, 1974

Mr. Rae Kalbfleisch, President
Montana County Attorney's Association
Toole County Courthouse
Shelby, Montana 59474

Dear Mr. Kalbfleisch:

As president of the Montana County Attorney's Association you have requested my opinion on the following question:

Which agencies or departments of government in the state of Montana have the authority to issue legal opinions to county attorneys or to other officers or boards in the state of Montana?

You indicate that several county attorneys in this state have asked you, as association president, to obtain an opinion on the foregoing question because various state boards and agencies are currently issuing legal opinions to county attorneys and other county agencies.

It should be noted initially that the attorney general is the chief legal officer of the state. Section 4, Article VI of the Constitution of Montana, 1972, provides in pertinent part:

* * *

"(4) The attorney general is the legal officer of the state and shall have the duties and powers provided by law."

* * *

The attorney general of Montana has the authority and obligation to render legal opinions to certain agencies and officers. His general duties are specified in Title 82, chapter 4, Revised Codes of Montana, 1947.

Section 82-401, R.C.M. 1947, provides in pertinent part:

"It is the duty of the attorney general:

* * *

"(6) To give his opinion in writing, without fee, to the legislative assembly, or either house thereof and to any state officer, board, or commission, any county attorney, and to the board of county commissioners of any county of the state, when required upon any question of law relating to their respective offices,"

The foregoing statutory provision was originally enacted as part of section 460, Political Code of 1895. Pursuant to this statute, the attorneys general of this state have prepared and issued published legal opinions since 1905.

The relative weight of an attorney general's opinion in terms of its legal application was considered in State ex rel. Barr v. District Court, 108 Mont. 433, 91 P.2d 399 (1939), wherein the court stated, at 108 Mont. 436:

"The Attorney General of Montana rendered an opinion on October 31, 1933 ... to the effect that county commissioners have the power to employ a manager for a county employment office to cooperate with the National Re-Employment Service. * * * While this executive construction of the law, acquiesced in by the legislative assembly, is not binding on this court, it is entitled to respectful consideration and will be upheld if not palpably erroneous." (Emphasis supplied)

See also: State ex rel. Ebel v. Schye, 130 Mont. 537, 305 P.2d 350 (1957).

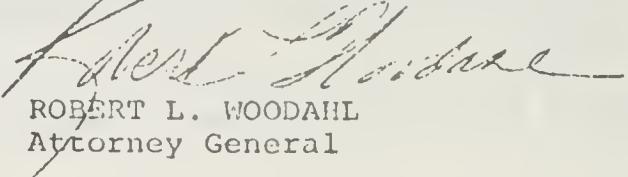
In light of the preceding discussion, it is clear that Montana's attorney general has been given specific legislative authority to issue legal opinions to county attorneys as well as other state and county government agencies and officers and, further, that such authority has been recognized by the state supreme court. My research does not disclose the existence of any comparable authority in other state agencies or officials.

It is true that certain agencies of state government have been given authority by the legislative assembly to employ legal counsel to assist such agencies in the accomplishment of their statutory duties. See, for example, section 66-1017, R.C.M. 1947 (Montana State Board of Medical Examiners), section 46-104, R.C.M. 1947 (Board of Livestock), and section 60-125F (Board of Oil and Gas Conservation). However, no state agency, or any legal counsel employed by a state agency, has been given the authority to issue legal opinions similar to the broad authority vested in the state's attorney general. The reason for this is apparent when the function of a legal opinion is considered.

A legal opinion, by definition, serves to construe the law in terms of a particular legal question or problem. The purpose of the opinion is to assist an official or a governmental body in understanding its rights and obligations under the law, thus facilitating the effectuation of such rights and obligations. However, as the term itself indicates, an opinion simply constitutes the legal reasoning of its author. Thus, had the legislature given broad authority to state agencies to issue legal opinions, differing interpretations of the same question would constantly occur, resulting in further confusion to the requesting entity. The legislative assembly, therefore, gave only the attorney general the specific authority to issue legal opinions, and while it does not appear that any state agency or official is statutorily precluded from rendering legal opinions, through its legal counsel, such opinions must ultimately yield to an attorney general's opinion addressed to the same question.

THEREFORE, IT IS MY OPINION that only the attorney general of Montana has the specific authority to issue legal opinions to county attorneys or other agencies of state and county government, and conflicting opinions on the same subject issued by other state officers or agencies should be disregarded.

Very truly yours,


ROBERT L. WOODAHL
Attorney General

RLW:dm

